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Montgomery County
Commission on Common Ownership Communities

In the Matter of Case No. 88-10
Carolyn Killea v. Cabin John Gardens, Inc.

and

Case #24-11
Maureen McNulty v. Cabin John Gardens, Inc.
(Consolidated)

Order
Granting in Part Respondent's Motion to Dismiss or for Summary Judgment
(March 8, 2012)

Background

The hearing panel is called upon to rule on a motion to dismiss or for summary judgment filed by the Respondent in two consolidated cases filed with the Commission on Common Ownership Communities (CCOC). A brief review of the two cases is in order.

CCOC #88-10 was filed by Carolyn Killea on December 17, 2010, against Cabin John Gardens, Inc. The Respondent is a residential housing cooperative composed of 100 single-family homes on separate lots. The Respondent owns the lots, and its governing documents give it the right to assign and to change the boundaries of the individual lots. Killea alleged that the Respondent's assignment of boundaries to Lot 6 on Thorne Road (hereinafter, "6 Thorne") was arbitrary and unreasonable, and took common land (or previously unassigned land open to all the members) and dedicated it to 6 Thorne without any compensation or benefit to the association as a whole. She

further alleged that the Respondent was allowing 6 Thorne to be used for commercial purposes, that the Respondent wrongly refused to allow the general membership of the association to vote on the boundaries of 6 Thorne at a special meeting called for that purpose, and that the Respondent was refusing to make its books and records available for inspection.

While #88-10 was pending, Maureen McNulty filed #24-11 on May 31, 2011. This complaint is essentially similar to #88-10, with the difference that McNulty clearly

alleged that the Respondent's decisions regarding the boundaries and use of 6 Thorne were not only unreasonable and arbitrary but made in bad faith and therefore were not subject to the "business judgment" rule.

After various proceedings, and settlement negotiations which were unsuccessful, both cases came to the CCOC for a vote on jurisdiction. The CCOC rejected jurisdiction of the claims of lack of access to the Respondent's books and records because those claims had become moot. However, it accepted jurisdiction of the issues of "acting in bad faith and arbitrarily to allocate community property to the exclusive use of one lot (6 Thorne); that Respondent has failed to act in good faith and reasonably to enforce its own rules against the use of any of its lots for commercial purposes at 6 Thorne; and that Respondent improperly conducted a special meeting by refusing to allow the members to vote on the issue of the boundaries of the lot at 6 Thorne Road." (See, "Summons, Statement of Charges, and Notice of Hearing.")

Both parties have propounded discovery pursuant to COMCOR Section 10B.06.01.04.

On November 24, 2011, the Respondent filed its Motion to Dismiss, or for Summary Judgment and Request for Attorneys Fees. The Respondent argued that the issues of the validity of the board's decisions regarding the boundaries of 6 Thorne, and of the validity of the first special meeting to review the board's decisions, have become moot, because on November 3, 2011, the Respondent's board of directors held a special meeting, called by the board, at which the membership was asked to vote to ratify the board's decisions regarding the boundaries of 6 Thorne.

The Complainants were aware of the meeting and participated in it. The final vote of the general membership was 48 to 23 in favor of the boundaries of 6 Thorne as established by the board. This is a two-thirds majority.

The Complainants oppose the motions on the grounds that discovery is not yet complete and that the allegations of bad faith depend on credibility judgments that the hearing panel can only make while observing the testimony of each witness. The Complainants claim that the board's decisions were "tainted" by conflicts of interest of its then-manager, who was an employee of the new shareholder of 6 Thorne, that the board's explanations for its decisions were inconsistent and inaccurate; that the board violated community rules and standards in dealing with the various proposals by the new shareholder of 6 Thorne; that the board showed improper favoritism to the new shareholder, etc. These claims go to the merits of the original disputes.

The Complainants also claim that summary judgment is not appropriate because the issue up for a vote at the November 3, 2011, meeting did not involve all the prior decisions of the board establishing the boundaries of 6 Thorne, but only the board's decisions made on August 2011, which made minor adjustments to the boundary.

Complainants also raise procedural challenges to that meeting, because their counsel was not available that night due to a schedule conflict, because they were not given equal time with the board to explain their positions, because the board confused the membership about the scope of the issue to be voted on, and because the board relied on information which it had not provided to the Complainants in discovery.

Finally, they argued that the holding of the special meeting violated the "automatic stay" provisions of Section 10B-9(e) of the Montgomery County Code.

Findings of Facts Not in Dispute

1. Cabin John Gardens Inc. is a residential housing corporation established pursuant to Chapter 5-6B of the Corporations and Associations Article of the Code of Maryland, and it is a common ownership community under Section 10B-2 and 10B-8(3)

of the Montgomery County Code, and a proper party to this dispute under Section 10B-8(8)(B) of the County Code.

2. Carolyn Killea and Maureen McNulty are members of Cabin John Gardens, Inc. and they are proper parties under Section 10B-8(8)(A) of the Montgomery County Code.

3. The governing documents of the Respondent consist of its Bylaws and of its Membership Agreement. Under Article V of the Bylaws, the board of directors has the authority to adopt, and to amend, all rules and regulations for the conduct of the affairs of the corporation and for its management and operations. Under Article IV of the Bylaws, special meetings of the general membership can be called by the board, by its president, or upon petition of at least 12 of the general members. Section 7 of Article IV of the Bylaws states that while "any business" can be conducted at the annual meetings, "at all other meetings only such business as is specified in the notice of such meeting shall be considered." Finally, Article IV, Section 6 of the Bylaws requires ten days' written notice of a special meeting.

4. The Membership Agreement provides (Section 6) that it is subject to the Bylaws. Section 4 states that the members of the Corporation "have the right to perpetual use and occupancy of the [specified] dwelling unit [. . .] and the land immediately surrounding the same, the boundaries of which shall be determined by the Corporation from time to time." Section 18 requires the member to maintain the dwelling unit in good condition, and also "the grounds immediately surrounding the same (the boundaries of which shall be determined by the Corporation as aforesaid)."

5. For approximately 20 years the Mathos family owned a small dwelling unit at 6 Thorne Road. This lot was at the end of Thorne Road, which dead-ends at that point. Across Thorne Road, and also adjacent to the dead end, is a vacant, unassigned lot which was used by all the members of the Corporation. Both Complainants live on

Thorne Road as well. In 2008, the Allen family purchased the dwelling from the Mathos family and applied for permission to remove the old dwelling unit and construct a much larger modern unit in its place.

6. As part of the approval process the board of directors marked the boundaries of 6 Thorne. The board determined that the lot was not only adjacent to one side of Thorne Road but also wrapped around the end of that road, so that it was in the general shape of a reversed "L."

7. The Complainants disputed that determination, arguing that the Mathos lot never included the land at the end of the road, which was instead part of the unassigned lot.

8. The board of directors rejected the Complainants' arguments and stood by its decision that the land at the end of the road belonged to 6 Thorne.

9. In September, 2010, the Complainants, after several attempts to resolve the dispute had failed, presented the board with a petition calling for a special meeting to discuss the boundaries of 6 Thorne. The board called the special meeting; however, the board refused to allow a vote on the boundaries of 6 Thorne because the petition and notice of meeting did not contain a motion for the members to vote upon. There was at that time no written rule that requires the notice of the special meeting to contain a motion to be voted upon, although, as noted, Article IV of the Bylaws limits special meetings to the issue "as is specified in the notice" of the meeting.

10. On October 21, 2011, the Respondent sent notice of a special meeting called for the purpose of voting to "confirm or overrule the Board's determination of the reserved use boundary for 6 Thorne Road." The notice also states that "[i]n the summer of 2008, Summer of 2010, and August 2011, the Board of Directors made decisions on the reserved use boundary for 6 Thorne Road. The Board is now calling this special meeting to enable the membership to understand how the boundary determination was made in August 2011 and to request that the membership affirm this reserved use boundary for 6 Thorne."

11. Both sides to this dispute made presentations at the November 3, 2011, special meeting, which lasted for approximately 2 hours. At the end of the presentations and questions, the dispute was put to a vote, and the membership voted 48 to 23 to confirm the board's decisions.

Conclusions of Law

The issue now before this panel is whether the vote of the membership to ratify the board's determination of the boundary of 6 Thorne effectively moots the claims of unreasonable and arbitrary decision-making, of bad faith, and of the validity of first special meeting in 2010, all of which concern the boundaries of 6 Thorne.

It cannot be argued that the general membership of the Respondent does not have the right to *reverse* the board's decisions, see Bylaws, Article IV. The same principle applies to the membership's right to *confirm or ratify* the board's decisions. This general right also applies to the authority of the general membership to confirm or reverse board decisions establishing the boundaries of the individual lots.

Indeed, the Complainants took this position when they petitioned for a special meeting in 2010 to review the board's series of decisions on the boundaries of 6 Thorne, and then again when they alleged in their complaint that the conduct of that special meeting was improper because it denied them the right to have the general membership itself determine the boundaries of 6 Thorne.

The general membership vote in November, 2011, to confirm the board's decisions on the boundaries of 6 Thorne falls under the doctrine of ratification. Under this doctrine, a board of directors can subsequently ratify a decision it made previously which may have been invalid for some procedural reason, so long as the decision itself was within the board's authority to make. As stated by the Kansas Court of Appeals in *Picard v. Sugar Valley Lakes Homes Association*, 151 P.3d 850, 854 (Kan. App. 2007):

It is a general principle of almost universal application that whenever a state, county, corporation, partnership, or person has the power originally to do a particular thing, it also has the power to ratify and make valid an attempted effort to do such thing, although the same may have been done ever so defectively, informally, or even fraudulently in the first instance.

The doctrine of ratification was also reviewed and applied in *Bennett v. Damascus Community Bank*, Montgomery County Circuit Court #267722-V (April 6, 2006) (2006 WL 2458718):

Further, the Board's decision at the March 31, 2005, meeting can be viewed as a ratification of the November 14, 2004, decision to terminate Bennett. Maryland case law on the subject of directorial ratification is scant. That which does exist, however, supports the proposition that directors can ratify prior decisions when the prior decision was defective for some reason but within their *de jure* authority. See, e.g., *Webb v. Duvall*, 177 Md. 592, 597-99 (1940); *Miller v. Matthews*, 87 Md. 464, 474-75 (1898). Decisional law from Delaware, however, is explicit that "where board authorization of corporate action that falls within the board's *de jure* authority is defective, the defect in authority can be cured retroactively by board ratification." *Kalageog v. Victor Kamkin, Inc.*, 750 A.2d 531, 539 (Del Ch. 1999).

Applying Delaware law, the United States Court of Appeals for the District of Columbia has reached the same conclusion. *Carramerica Realty Corp. v. Kaidanow*, 321 F.3d. 165, 173 (D.C.Cir. 2003). Here, directors of the Bank had

the legal authority to terminate Bennett under both the Bank's Bylaws and [Section] 2-413 of the Corporations Article. To the extent that the Board action at its regular meeting on November 10, 2004, is somehow considered defective, it was nevertheless ratified at the Board meeting held on March 31, 2005.

Applying the principal of ratification to this case, the general membership itself has the requisite authority to review decisions of its Board of Directors concerning 6 Thorne. We therefore conclude that the vote of the general membership in November, 2011, to confirm the board's previous decisions on the boundaries of 6 Thorne Road, constitutes a ratification of those decisions and effectively moots the issues of whether the board's decisions setting the boundaries of the lot and its decision to prevent a vote at the 2010 general meeting were somehow defective. Whatever defects there may have been, the membership had the right to review them and decide whether or not to ratify the final result. As is reflected by the results of the November 2011 special meeting, the membership took such action and overwhelmingly voted to ratify the past Board decisions with respect to 6 Thorne.

The Complainants challenge the membership vote on the grounds of fairness. They do not argue that the Respondent violated any of its governing documents in the course of calling and conducting the special meeting. Instead, they argue that:

1. The vote only involved the most recent decision of the board, made in August, 2011, during which the board made minor adjustments to the shape of the cul-de-sac and to the adjacent boundaries of 6 Thorne, and did not involve the underlying board decisions made in 2008-2010, when the board determined that the strip of land at the end of Thorne Road, between the road and the community boundary fence, belonged to 6 Thorne.

2. The board gave "minimum notice" of the special meeting, and as a result the Complainant's attorney was unable to attend.

3. The board did not give equal time to the opposing parties.

4. The board presented information at the special meeting which it did not disclose during discovery in this dispute; and,

5. The meeting violated the automatic stay of Section 10B-9(e).

The undisputed facts are that on October 21, 2011, the board gave notice of a special meeting to take place on November 3, 2011. This constitutes at least 12 days' notice and it complies with Article IV, Section 6 of the Bylaws that requires a written notice mailed or delivered to each member "not less than 10 days prior" to the meeting. The notice states that the purpose of the meeting is to: "VOTE ON: confirm or overrule the Board's determination of the reserved use boundary for 6 Thorne Road."

It goes on to state that "in the Summer of 2008, 2010, and August, 2011, the Board of Directors made decisions on the reserved use boundary for 6 Thorne Road. The Board is calling this special meeting to enable the membership to understand how the boundary determination was made in August 2011 and to request that the membership affirm this reserved use boundary for 6 Thorne."

Based on the foregoing the Panel finds that there is no room for reasonable doubt about the purpose of the special meeting. First of all, the notice itself says the vote will be generally whether to confirm or overrule the Board's decision on the boundary of the lot. The explanatory paragraph that follows refers clearly to a series of decisions over the years, with the most recent one, August 2011, being the final one. Moreover, the exhibits included in the motion, which were used at the special meeting by the board, make even more clear that the issue was not merely the minor adjustments made to the boundary line in August, 2011, but the board's core decisions assigning the strip of land at the end of Thorne Road to 6 Thorne. The ballot used at the special meeting does not limit itself to the August, 2011, decision, but states broadly that "I vote to confirm the board's determination of the reserved use boundary for 6 Thorne Road." The record is also clear and undisputed that the Board's decisions were made in open meetings, recorded in minutes, the subject of controversy and debate, and finally the subject of a special meeting called in October, 2010. There is no credible evidence that the community as a whole was not aware that the issue to be decided was not merely minor modifications to the shape of the Thorne Road cul-de-sac but rather the overall configuration of the lot at 6 Thorne.

The Complainants object that minimum notice was given so that their attorney could not attend. However, the panel finds that the Respondent gave proper notice. In fact, the Respondent gave more than the minimum ten day notice required by its Bylaws. If the Complainants' attorney was not available to speak at the special meeting, any unfairness was avoided by the fact that the meeting was structured and conducted as a forum for member statements and presentations, not those of a lawyer. It is also undisputed that the Complainants themselves were able to speak and that they are intimately familiar with the details of all the proceedings regarding the boundary of 6 Thorne.

Complainants further claim that they were not given equal time with the board's representative at the special meeting. It is undisputed that they were, however, given the right to make a presentation and to answer any questions from the audience. The Complainants have not explained or shown how the lack of equal time was detrimental to them or prevented them from fairly presenting their arguments to the membership.

Complainants also argue that the Respondent used materials at the November special meeting which it had not provided in discovery. They have not demonstrated, however, why a meeting called by the corporation and not subject to the panel's supervision, is subject to the discovery rules

applicable to this dispute. Nor is it clear how those materials, even assuming that they were subject to discovery but not properly supplied in discovery, had any significant effect on the outcome of the vote.

Finally, Complainants argue that the special meeting of November 3, 2011, violated the automatic stay. We first note that, although they were aware that the special meeting was being called, no formal request was made by the Complainants to the Panel to take action to prevent it. More importantly, the automatic stay simply does not apply to the special meeting. Section 10B-9(e) states that "when a dispute is filed with the Commission, a community association must not take any action to enforce or implement the association's decision." The board's decision to call a special meeting for the purpose of allowing a membership vote on its decisions could have easily resulted in a vote to overrule those decisions as to ratify them. Moreover, even if the membership voted (as it did) to ratify the board's decision, that vote, by itself, does not "implement" a decision but merely confirms it.

The panel finds that the Complainants have failed to raise any material issues of fact concerning the validity of the November 3, 2011, special meeting.

Accordingly, the panel finds, as a matter of law, that the results of the November 3, 2011, special meeting ratifying the decisions of the board of directors concerning the boundaries of 6 Thorne Road was properly called and conducted; that the decision made at that meeting was within the authority of the Respondent's members; that both sides were allowed to present their positions to the general membership, and that the membership, by a 2 to 1 vote, ratified the board's decisions with respect to 6 Thorne. As a result of the foregoing, the panel holds that the vote of the membership at the meeting has rendered moot the Respondents' claims that the board's decisions regarding the boundaries of 6 Thorne Road were either unreasonable or made in bad faith. The panel further finds that the calling and result of that meeting also render moot any dispute over the validity of the October, 2010 special meeting.

ORDER

UPON CONSIDERATION of the Respondent's Motion to Dismiss, or for Summary Judgment and Request for Attorney's Fees, the opposition thereto by Complainants, the reply by Respondent, and oral argument occurring on December 15, 2011, it is this 8th day of March, 2012:

ORDERED, that the Respondent's Motion is Granted with respect to the following claims:

(1) That the Respondent violated the rules of the community by acting in bad faith and arbitrarily to allocate community property to the exclusive use of one lot (6 Thorne Road), and

(2) That the Respondent improperly conducted a special meeting by refusing to allow the members to vote on the issue of the boundaries of the lot at 6 Thorne Road. Accordingly, judgment on these two claims in the Complaint is entered in favor of the Respondent, and it is further

ORDERED, that the Respondent's Motion is Denied with respect to the following claims:

- (1) Respondent failed to act in good faith and reasonably to enforce its own rules against the use of any of its lots for commercial urposes, and
- (2) Respondent's request for attorney fees.

These two claims will be heard at the hearing set for this case on March 28, 2012 at 5:00 p.m.

Panel Members Jan Wilson and Helen Whelan concur in this decision.

Julianne E. Dymowski, Esquire
Panel Chair